No. 15-5040

In The Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania, Eastern District

BRIEF OF AMICUS CURIAE ON BEHALF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PETITIONER

WENDY COLE LASCHER
Counsel of Record
FERGUSON CASE ORR PATERSON, LLP
1050 S. Kimball Road
Ventura, California 93004
(805) 659-6800
wlascher@fcoplaw.com

CHARLES A. BIRD
President, American Academy
of Appellate Lawyers
DENTONS US LLP
600 W. Broadway, Suite 2600
San Diego, California 92101
(619) 236-1414
charles.bird@dentons.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

BRIEF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS, AMICUS CURIAE, SUPPORTING PETITIONER 1

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Due Process Precludes Involvement by a Judge Who Participated in the Decision Under Review 5

II. Recusal of a Potentially Biased Judge Is Essential to Maintaining an Effective Legal System and Preserving Respect for Law 8

III. The Collegial Nature of Appellate Decisionmaking Prohibits Participation of a Biased Judge Whether the Court Is Divided or Unanimous 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 10, 11

Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009) 5

Haluck v. Ricoh Electronics, Inc., 151 Cal.App.4th 994, 60 Cal.Rptr.3d 542 (Cal.App. 2007) 4

In re Hon. Charles E. Kading, 235 N.W.2d 409 (Wis. 1975) 9

In re Murchison, 349 U.S. 133 (1955) 8

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 6

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 5

Moles v. Regents of University of California, 654 P.2d 740 (Cal. 1982) 11

Offutt v. United States, 348 U.S. 11 (1954) 8

State v. Allen, 778 N.W.2d 863 (Wis. 2010) 9

Tumey v. Ohio, 273 U.S. 510 (1927) 5, 6

Williams-Yulee v. Florida Bar, 135 S.Ct. 1656 (2015) 4, 5

RULES

Supreme Court Rule 37.3(a) 1

Supreme Court Rule 37.6 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

American Academy of Appellate Lawyers, "Principles of State Appellate Judicial Disqualification" 3, 8, 9, 10

Frank M. Coffin, *The Ways of a Judge* (1980).....11

Daniel J. Meador, Maurice Rosenberg and Paul D. Carrington, *Appellate Courts: Structures, Functions, Processes, and Personnel* (Michie 1994) 9

Richard A. Posner, *How Judges Think* (Harvard University Press, 2008).....7

Jennifer K. Robbenolt and Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 American Psychological Association Judicial Notebook No. 2 (2010).....6

BRIEF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS, AMICUS CURIAE, SUPPORTING PETITIONER

The American Academy of Appellate Lawyers submits this brief as amicus curiae in support of petitioners.[1]

INTEREST OF THE AMICUS CURIAE

The American Academy of Appellate Lawyers (the "Academy") is a non-profit, national professional association of lawyers skilled and experienced in appellate practice and related post-trial activity in state and federal courts, dedicated to the enhancement of the standards of appellate practice and the administration of justice, and to the ethics of the profession as they relate to appellate practice. Membership in the Academy is by nomination or invitation only, and the Academy currently has 295 active

[1] The parties to the action have consented in writing to the filing of amicus briefs pursuant to Rule 37.3(a) of the Rules of this Court. The parties' letters of consent have been filed with the Clerk of the Court.

Pursuant to Supreme Court Rule 37.6, the Academy states that this brief was written by Fellows of the Academy, and was produced and funded exclusively by the Academy or its counsel. No party or counsel for a party was involved in preparing this brief or made a monetary contribution intended to fund the preparation or submission. Some of the Fellows of the Academy are active or former judicial officers. No active judicial officer has participated in the decision to file this brief or in its preparation.

member "Fellows." The activities of the Academy are supported entirely by the dues, program fees and initiation fees paid by the Fellows.

By publishing newsletters and reports, conducting retreats and conferences, teaching appellate courses and seminars, and establishing a network of appellate practitioners and scholars, the Academy brings together the leading attorneys in the nation who devote their practices and teaching to appellate decisionmaking and the administration of justice on appeal. The Academy has submitted its views to Congress on legislative changes affecting appellate practice and has helped organize, chair and administer a national conference on the functioning of the appellate courts. In pursuit of its mission, the Academy has submitted comments and testified to the Advisory Committee on Rules of Appellate Procedure, and has previously filed amicus curiae briefs in this Court.[2]

The Fellows of the Academy offer comprehensive knowledge of the roles of state and federal appellate courts and the leadership role of those courts in the development of American law. In 2010, after extensive investigation, the Academy promulgated

---

[2] Brief of the American Academy of Appellate Lawyers Amicus Curiae Supporting Petition for a Writ of Certiorari, *Mountain Enterprises, Inc. v. Fitch*, 541 U.S. 989 (2004) (No. 03-1222)

Brief of the American Academy of Appellate Lawyers, Amicus Curiae, Supporting Petitioners, *Caperton v. A.T. Massey Coal Company, Inc.*, 556 U.S. 868 (2009)

and published eight "Principles of State Appellate Judicial Disqualification," *http://appellateacademy.org/publications/policies/recusal_standards.pdf* ("*Principles*"). These *Principles* reflect the Academy's collective views on the best practices that should be used in resolving judicial recusal issues.

The Academy is filing this amicus brief because its Fellows believe that public respect for the fairness, impartiality and objectivity of appellate courts is essential to the performance of their roles. Both objectivity and the public perception of objectivity are essential to maintaining public respect for the courts and preserving the integrity of our system of appellate justice.

SUMMARY OF ARGUMENT

When a sitting judge has previously played a direct role in prosecuting a criminal defendant, the judge's subsequent participation in review of the defendant's conviction and sentence violates the defendant's right to due process of law, creates the appearance of impropriety and very likely presents an improper conflict of interest. This circumstance thus impairs the public perception of the courts and violates the defendant's right to due process of law. These concerns are magnified when the judge is a former prosecutor who founded his judicial campaign on having "sent 45 people to death row," one of whom is the defendant now before the judge, and where the

very conduct of the District Attorney's office he headed is under review.

"[T]he source of judicial authority lies ultimately in the faith of the people that a fair hearing may be had." *Haluck v. Ricoh Electronics, Inc.*, 151 Cal.App.4th 994, 1008, 60 Cal.Rptr.3d 542 (Cal.App. 2007) (internal quotation marks omitted). Because bias or perceived bias influences the public's perception of the judicial system as well as the case of an individual defendant, due process and proper respect for appellate decisionmaking requires reversal of rulings in which such a judge has taken part, regardless whether the judge has cast the decisive vote.

ARGUMENT

Judges wear robes not merely out of tradition, but to signal that whatever their individual views, they act as objective neutrals, not as partisans, when they serve the law. Unless corrected, the denial of petitioner's recusal motion, the refusal to refer the recusal motion to the full court, and the outcome of the post-conviction proceedings will undermine respect for the process of judicial review and for the rule of law itself.

"The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government." *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1666 (2015). Its authority "depends in large measure on the public's willingness to

respect and follow its decisions," *id.*, and that means "that public perception of judicial integrity is a 'state interest of the highest order.'" *Id.*, *quoting Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009).

This Court has previously identified circumstances in which a judge's interest in the outcome of a case should disqualify that judge from participation. One is where sitting on the case "would offer a possible temptation to the average . . . judge to . lead him not to hold the balance nice, clear and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Another occurs when an attack on a judge's character or actions is such that an average judge in that position is not "likely" to be neutral. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). And the third circumstance, the focus of *Caperton*, is a judicial election where a litigant with a personal stake in the outcome of a case makes a significant contribution to a reviewing judge's election campaign. The Court required that the possibility of bias be measured objectively, based on the likely effect on an "average judge."

I. Due Process Precludes Involvement by a Judge Who Participated in the Decision Under Review

Judicial neutrality lies at the heart of due process of law. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Williams-Yulee*, *supra*, 135

S.Ct. at 1674 (Ginsburg, J., concurring), quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

There are no circumstances in which a former executive branch officer who subsequently becomes a judge can "hold the balance nice, clear and true" (*Tumey*, *supra*, 273 U.S. at 532) in reviewing an action he or she took on behalf of the executive branch. It does not matter whether the case before the court is a death penalty case, or even a criminal case; it does not matter whether the judge was a prosecutor, or the chair of a federal commission, or the special assistant to a state's governor. The essence of judicial review is fair and unbiased review by neutral decisionmakers. When a judge undertakes to review an action that he or she took as an executive branch official, there is at least an appearance of bias, and a serious risk of actual bias.

Asking a person to sit neutrally in judgment of his or her own past performance calls for the impossible. "People believe they are objective, see themselves as more ethical and fair than others, and experience a 'bias blind spot,' the tendency to see bias in others but not in themselves." Jennifer K. Robbenolt and Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 American Psychological Association Judicial Notebook No. 2 (2010), p. 24, internal citations omitted.[3] We tend to evaluate

---

[3] http://www.apa.org/monitor/2010/02/jn.aspx, accessed December 2, 2015.

our own views favorably: "[w]e use introspection to acquit ourselves of accusations of bias, while using realistic notions of human behavior to identify bias in others." Richard A. Posner, *How Judges Think* (Harvard University Press, 2008), p. 121.

Here, the appellate justice's involvement in the underlying case went well beyond the personal – handwritten – approval of the decision to seek the death penalty. JA 426a. As the District Attorney, he was responsible for a prosecutor's office found to have: "intentionally rooted out information" favorable to the defense from pretrial disclosures, JA 152a; "sanitized" evidence, JA 101a; coerced a witness to testify favorably to the prosecution, JA 70a n. 14; presented false evidence, JA 152a-153a, 155a, 159a; and made false representations in earlier post-conviction proceedings, JA 86a-89a. He then won his judicial position on the basis of having "sent 45 people" – including petitioner – "to death row."

Given his position of oversight and his ensuing "tough on crime" campaign, there is no basis on which the appellate justice's eventual role in the decision can be described – objectively – as unbiased or neutral. And (to state the obvious) this is notwithstanding the justice's integrity as an individual or as a judge.

There is little doubt that the appellate justice believed he could fairly adjudge petitioner's case. But that is not the test, nor should individual belief play a role in the analysis. The appearance of neutrality and objectivity is a systemic issue that must be considered

from a systemic perspective. Every litigant is entitled to "review on the merits by judges whose impartiality cannot reasonably be questioned." *Principles*, p. 1. "A 'fair trial in a fair tribunal is a basic requirement of due process.'" *In re Murchison*, 349 U.S. 133, 136 (1955). Therefore, the Court should categorically foreclose a judge from reviewing a determination he or she was responsible for as head of an executive department.

II. Recusal of a Potentially Biased Judge Is Essential to Maintaining an Effective Legal System and Preserving Respect for Law

"[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Murchison*, *supra*, 349 U.S. at 136, quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954). The appearance of bias, let alone actual bias, causes the public to lose respect for and confidence in the judicial system. *Principles*, p. 2. Appellate courts, and especially supreme courts, should lead by setting a high standard for probity. In this case, where the appellate justice's leadership of the District Attorney's office is called into question, his participation as a judicial officer in that review has the opposite effect.

The spectacle of a prejudiced or possibly prejudiced judge sitting in judgment upon the rights of litigants throws courts and the administration of justice into disrespect. The resulting lack of confidence in the integrity of courts "'rocks the very foundations

of organized society, promotes unrest and dissatisfaction, and even encourages revolution.'" *State v. Allen*, 778 N.W.2d 863, 878 (Wis. 2010), quoting *In re Hon. Charles E. Kading*, 235 N.W.2d 409 (Wis. 1975).

Moreover, if the bias of an appellate decisionmaker affects his or her reasoning about an appeal, "then the taint of that biased decision extends to every future litigant whose case may be affected by the appellate decision under the principle of stare decisis." *Principles*, p. 2. "Appellate opinions 'collectively form the body of the common law' and 'govern what a trial judge does, even if no appeal is ever taken in a particular case. . . .'" *Id.*, quoting Daniel J. Meador, Maurice Rosenberg and Paul D. Carrington, *Appellate Courts: Structures, Functions, Processes, and Personnel* xxxi-xxxii (Michie 1994). "Decisions of appellate courts also guide the advice lawyers give their clients, the actions clients take based on that advice, even the content of legal forms people use. The text of the opinion deciding a case may have as much effect on future litigants and on others who depend on the state of the law as it does for the immediate parties to a case." *Principles*, pp. 2-3.

"Correcting trial court error is another important role played by appellate courts. For more than two centuries, the American people have made provision for appellate courts in their state constitutions, to elevate fairness and equal application of justice over the risks of local bias and the fallibility of trial judges acting alone. . . Appellate oversight of trial courts brings consistency to the legal system as a whole.

That oversight must be exercised without bias." *Principles*, p. 3.

The adverse systemic consequences of not requiring recusal in this instance are apparent. There are no countervailing interests that outweigh the concerns raised by the failure to recuse. The Academy's published *Principles* identify tools to preserve the integrity of decisionmakers, such as referring the recusal issue to other judges, or providing for review of the recusal determination. Where those tools are not used, and principles of due process are transgressed, this Court should insist on a higher standard.

III. The Collegial Nature of Appellate Decisionmaking Prohibits Participation of a Biased Judge Whether the Court Is Divided or Unanimous

"[W]hile the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Brennan, J., concurring). Therefore the participation of a biased, or potentially biased, member of an appellate panel requires reversal of a decision regardless of whether that justice cast the deciding vote. "'The different perceptions, premises, logic, and values of *three or more* judges ensure a better judgment. In these differences and in the process of criticism, response, and resolution lies the virtue of

the appellate process.'" *Moles v. Regents of University of California*, 654 P.2d 740, 744 (Cal. 1982), emphasis in original, quoting Frank M. Coffin, *The Ways of a Judge* (1980) at p. 174.

> Our experience should tell us that the concessions extracted as the price of joining an opinion may influence its shape as decisively as the sentiments of its nominal author. To discern a constitutionally significant difference between the author of an opinion and the other judges who participated in a case ignores the possibility that the collegial decisionmaking process that is the hallmark of multimember courts led the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity.

Lavoie, supra, 475 U.S. at 832-833 (Blackmun, J., concurring).

As these authorities attest, the appellate judge's participation here tainted the entire process in a manner that due process will not tolerate. Collective decisionmaking, the hallmark of the appellate process, should not be sacrificed to a "no harm, no foul" rationalization.

CONCLUSION

To preserve the interests of justice, the Court should reverse the decision of the Pennsylvania Supreme Court and remand the case.

Respectfully submitted,

CHARLES BIRD
President, American Academy of Appellate Lawyers
DENTONS US LLP
600 W. Broadway, Suite 2600
San Diego, California 92101
(619) 236-1414

WENDY COLE LASCHER
Counsel of Record
FERGUSON CASE ORR PATERSON, LLP
1050 S. Kimball Road
Ventura, California 93004
(805) 659-6800

Counsel for Amicus Curiae

Dated: December 7, 2015